

NO. 48800-1-II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JOHN MAYFIELD,

Appellant.

RESPONDENT'S BRIEF

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I. ISSUE

1. Does the attenuation doctrine violate article I, section 7 of the Washington Constitution?
2. Was the Appellant's consent to search sufficiently attenuated from the illegal detention after he was informed of his *Ferrier* warnings?

II. SHORT ANSWER

1. **No.** Washington applies the attenuation doctrine and is appropriate under article I, section 7 of the Washington Constitution.
2. **Yes.** The Appellant's post-*Ferrier* consent was sufficiently attenuated and valid.

III. STATEMENT OF FACTS

On January 3, 2015, Cowlitz County Sheriff's Deputy Andy Nunes was dispatched to a call in regards to a suspicious vehicle that was parked in the driveway of a residence. RP 4-5. Upon arrival, Deputy Nunes contacted Mr. Salte, the homeowner. Deputy Nunes also observed a silver Toyota pickup truck parked in the driveway. RP 5-6. The truck's lights were on, the engine was running, the windshield wipers were going, the passenger-side door was ajar, but no one was inside. RP 6.

Mr. Salte told Deputy Nunes that when he arrived home, the truck was parked in his driveway and blocking access to his home. Mr. Salte observed a male individual inside of the truck who appeared to be sleeping. RP 6. Mr. Salte attempted to wake up the male several times. Upon waking up, the male appeared to be agitated. Mr. Salte told the male that he needed

to leave his property. The male became more agitated, appeared to put the truck in reverse, and began to rev the engine. When the truck did not move, the male exited the truck through the passenger-side door and fled. RP 7.

Deputy Nunes discovered a hat laying on the ground near the truck. He placed the hat in the passenger-side of the truck and closed the door. Deputy Nunes also shut the truck's headlights off, turned off the engine, and placed the keys on the seat. RP 7-8. While doing so, Deputy Nunes did access or search any parts of the truck. RP 8.

While further discussing the issue with Mr. Salte, Deputy Nunes observed a male individual walking from the direction that Mr. Salte had said the male had fled. Deputy Nunes observed the male walking on the opposite of the street that he and the truck were located. RP 8. As he was walking, the male did not make a single attempt to contact Deputy Nunes or come towards the truck. RP 8. Mr. Salte told Deputy Nunes that the male walking was the same male that had been within the truck. Deputy Nunes walked into the middle of the street and made contact with the male, who was identified as John Mayfield, the appellant. RP 8-9.

Deputy Nunes spoke with the appellant about his truck being parked at Mr. Salte's residence. Deputy Nunes described the conversation being conducted in a casual manner. RP 9. The appellant initially told Deputy Nunes that his truck was parked at Mr. Salte's residence because he needed

to use the restroom. Later, the appellant change his story and said that his truck was at Mr. Salte's residence because he was having trouble with it. RP 9. The appellant told Deputy Nunes that Mr. Salte was confrontational and that he fled the truck because he was concerned that Mr. Salte intended on assaulting him. RP 10. The appellant said he fled the truck and went to his friend's residence further down the road; however, his friend was not home. The appellant provided no explanation why he was walking away from the truck as Deputy Nunes contacted him. RP 10. During this conversation, Cowlitz County Sheriff's Deputy Corey Huffine arrived as a cover unit. RP 10.

Deputy Nunes could not point to a specific crime that the appellant may have committed. However, Deputy Nunes noted that, under these circumstances, it was unusual for an individual to have vehicle problems, flee from the vehicle as it was still running, and then completely attempt to avoid law enforcement when walking back towards the area of the vehicle. RP 11. Deputy Nunes decided to determine if the appellant was actually the owner of the vehicle. Upon request, the appellant provided Deputy Nunes with his identification. RP 12. While checking the appellant's name through dispatch, Deputy Nunes learned that the appellant was a convicted felon and DOC active. RP 13. Deputy Nunes then ran the appellant's name through the local records database and read through the appellant's

conviction history. RP 12-13. Based upon the nature of the call, his observations while investigating, the information being provided to him by Mr. Salte and the appellant, and the appellant's criminal history, Deputy Nunes suspected that drugs may be involved. RP 12-13.

Deputy Nunes contacted the appellant and asked if he had anything on his person that was illegal or that would cause any concern. The appellant stated that he did not. Deputy Nunes then requested consent to search his person. The appellant replied that he did not have a problem with that. Deputy Nunes then told the appellant that he did not have to consent to the search of his person. The appellant again stated that he did not have a problem with the requested search. RP 13. Deputy Nunes located the appellant's wallet in his back pocket. In the appellant's left pocket, Deputy Nunes located \$464 in cash, which was packed in three different bundles. Based upon his training and experience, the manner in which the money was bundled was consistent with either the purchase or sale of drugs. RP 14. Deputy Nunes returned the money and wallet to the appellant.

Deputy Nunes then turned his attention to the appellant's truck. The appellant told Deputy Nunes that the truck did not contain any illegal items. Deputy Nunes requested consent to search the appellant's truck. He asked the appellant if he would mind if he voluntarily searched his truck. The appellant said it was ok to search. Deputy Nunes then advised the appellant

of his *Ferrier* warnings – the right to refuse the search, the right to restrict the search, and the right to revoke the search at any time. The appellant said he understood his rights and that Deputy Nunes could search the truck. RP 16. At no point did the appellant appear to be confused or not understand his *Ferrier* warnings. The appellant never revoked or restricted consent. RP 16.

Upon searching the appellant's truck, Deputy Nunes located numerous small baggies, some containing what appeared to be drug residue. Deputy Nunes also located a large black box that contained a large package of what appeared to be methamphetamine. RP 17. The appellant was ultimately arrested for Possession of a Controlled Substance with Intent to Deliver.

On January 7, 2015, the Cowlitz County Prosecutor's Office charged the appellant with one count of Possession of a Controlled Substance with Intent to Deliver. CP 1-2. On July 14, 2015, the appellant's motion to suppress was denied. CP 20. The appellant's trial commenced on February 16, 2016. RP 65-367. The jury found the appellant guilty of Possession of a Controlled Substance with Intent to Deliver. RP 358-62. The trial court sentenced the appellant to a standard range sentence. CP 58-60. The appellant filed a timely notice of appeal. CP 68.

For the purposes of this appeal, the State agrees with the Findings of Fact and Conclusions of Law as contained in the Appellant's Brief.

IV. ARGUMENT

A. THE ATTENUATION DOCTRINE IS CONSISTENT WITH ARTICLE I, SECTION 7 OF THE WASHINGTON CONSTITUTION.

Under the attenuation doctrine, whether a confession, or a consent to search, is tainted by a prior illegal arrest, the court will consider four factors: (1) temporal proximity of the arrest and subsequent consent, (2) the presence of significant intervening circumstances, (3) the purpose and flagrancy of the official misconduct, and (4) the giving of *Miranda*¹ warnings. *State v. Tijerina*, 61, Wn. App. 626, 630, 811 P.2d 241 (1991) (citing *Taylor v. Alabama*, 457 U.S. 687, 690, 102 S.Ct. 2664, 73 L.Ed.2d 314 (1982); *State v. Jensen*, 44 Wn. App. 485, 490, 723 P.2d 443 (1986)).

“Whether the attenuation exception to the search warrant requirement is permitted under our state constitution remains an open question.” *State v. Smith*, 165 Wn. App. 296, 313, 266 P.3d 250 (2011). Despite this, Washington courts have consistently employed the attenuation doctrine when determining whether “the challenged evidence was ‘fruit of the poisonous tree’ or so ‘attenuated as to dissipate the taint.’” *State v.*

¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Eserjoe, 171 Wn.2d 907, 919, (259 P.3d 172) (citing *State v. Warner*, 126 Wn.2d 876, 889 P.2d 479 (1995); *State v. Rothenberger*, 73 Wn.2d 596, 440 P.2d 1280 (1968); *State v. Vangen*, 72 Wn.2d 548, 433 P.2d 691 (1967). “[W]e have, at least, implicitly adopted the attenuation doctrine, that doctrine being intimately related to the ‘fruit of the poisonous tree’ doctrine.” *Eserjose*, 171 Wn.2d at 920.

Additionally, “direct evidence proves that this court has a long history of closely following United States Supreme Court precedent with respect to the exclusionary rule, especially the attenuation doctrine.” *State v. Ibarra-Cisneros*, 172 Wn.2d 880, 911, 263 P.3d 591 (2011) (J.M. Johnson, J., dissenting); *see also Tierna*, 61 Wn. App. at 630, *Jensen*, 44 Wn. App. at 490, *State v. Smith*, 165 Wn. App. 296, 266 P.3d 250 (2011) *affirmed on other grounds*, 17 Wn.2d 533, 303 P.3 1047. Washington courts have even remanded cases to determine whether “the string of causation was sufficiently attenuated so as to bring it within the exception.” *State v. Warner*, 125 Wn.2d 876, 889, 889 P.2d 479 (1995).

“The federal attenuation doctrine, an exception to the exclusionary rule, is consistent with article I, section 7 of the Washington Constitution.” *Ibarra-Cisneros*, 172 Wn.2d at 907. Its continued use by Washington courts has demonstrated that it is consistent with the protections afforded

by the Washington Constitution. Therefore, the trial court's reliance upon the attenuation doctrine was appropriate.

B. DEPUTY NUNES SEARCH OF THE APPELLANT'S TRUCK WAS SUFFICIENTLY ATTENUATED FROM THE PREVIOUS ILLEGAL DETENTION.

One exception to the warrant requirement for searches is consent. *State v. Raines*, 55 Wn. App. 459, 462, 778 P.2d 538 (1989). The State has the burden of demonstrating the voluntariness of consent. The State's burden is to show voluntariness by clear and convincing evidence considering the totality of the circumstances. *State v. Shoemaker*, 85 Wn.2d 207, 210, 533 P.2d 123 (1975); *State v. McCrorey*, 70 Wn. App. 103, 108, 851 P.2d 1234 (1993). As stated above, the court will consider several non-exclusive factors in determining whether consent to a search is tainted by a prior illegal seizure: "(1) temporal proximity of the illegality and the subsequent consent, (2) the presence of significant intervening circumstances, (3) the purpose and flagrancy of the official misconduct, and (4) the giving of *Miranda* warnings." *Tijerina*, 61, Wn. App. at 630 (1991); *Soto-Garcia*, 68 Wn. App. at 27.

At the time of the motion to suppress, the State conceded that there was close temporal proximity of the detention. When looking at the "purpose and flagrancy of the official misconduct," the trial court correctly concluded that although Deputy Nunes initial purpose was to determine

what the Appellant was doing at Mr. Salte's residence, his continued contact with the Appellant developed into a drug investigation absent any reasonable and articulable suspicion. CP 20.

However, the Appellant was provided with his *Ferrier*² warnings prior to his consent and search of his truck. This would be a significant intervening factor and, under these particular set of facts, satisfy the requirement for constitutional warnings. Where defendants have been advised of their right to refuse consent to a search or to limit the scope of a search, courts have held that the consent was not tainted by the prior illegal detention. *See State v. Gonzales*, 46 Wn. App. 388, 399, 731 P.2d 1101 (1986); *Jensen*, 44 Wn. App. at 490-91.

Here, the main issue in contention is not a confession, as was the case in *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1976) and *Taylor v. Alabama* 457 U.S. 687, 102 S.Ct. 2664, 73 L.Ed. 2d 314 (1982). The Appellant's reliance upon *Armenta* and *Tijerina* is also misplaced. In those cases, not only were the defendants not advised of their constitutional rights, they were not advised of their rights to refuse consent to search. Here, the Appellant was advised of his right to refuse a search and his right to limit the scope of the search. And because he was advised


² *State v. Ferrier*, 136 Wn.2d 103 (1998).

of these rights, the trial court correctly concluded that the Appellant's detention did not taint his consent to search.

V. CONCLUSION

For the above stated reasons, the Appellant's appeal should be denied.

Respectfully submitted this 14th day of March, 2017.



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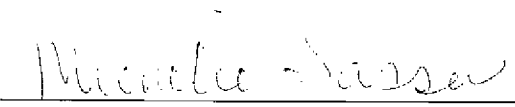
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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on March 14th, 2017.



Michelle Sasser

COWLITZ COUNTY PROSECUTOR
March 14, 2017 - 12:56 PM
Transmittal Letter

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